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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,

Petitioner,

—v.—

BOSTON CHAPTER, NAACP, INC., et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE NATIONAL BLACK POLICE ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION, and ACLU OF MASSACHUSETTS, *AMICI CURIAE*

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INTEREST OF AMICI*

The National Black Police Association is a nationwide organization currently comprised of 85 local black police associations representing more than 20,000 black police officers throughout the United States.

Among the purposes of the NBPA is the elimination of racial discrimination in public safety departments, particularly in employment with its concomitant effect on improving the delivery of public safety services to all members of the community. Based on its experience, there simply is no question that a significant representation of minorities at all levels of public safety employment curtails official brutality and corruption, lessens racial tensions, and

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* The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

greatly increases respect for and hence cooperation with public safety officers.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States. The ACLU of Massachusetts is a state affiliate of the national ACLU.

The ACLU's long standing commitment to equal protection of the laws has led it to conclude as a matter of policy that our country's history of racism "cannot be satisfactorily eliminated merely by the prospective adoption of neutral, 'color blind' . . . standards for selection, promotion, or retention" in employment and in education, and that the use of "numerical remedies" is appropriate to overcome our nation's legacy of discrimination. Application of this race conscious policy is particularly appropriate in the

context of public safety employment, in which there has been an historical exclusion of minorities and in which the substantial representation of minorities is so crucial to the effective delivery of public safety services to all persons.

For the reasons set forth in this brief, the NBPA, the ACLU, and the ACLU of Massachusetts urge this Court to affirm the judgment of the First Circuit.

SUMMARY OF ARGUMENT

These cases involve an attempt by the plaintiffs-respondents, and to a lesser degree by the City of Boston and its Police and Fire Commissioners, to evolve remedial mechanisms designed to eliminate the effects of racially discriminatory employment policies which had been judicially determined to violate the law.

Although the remedial plan in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), was upheld by this Court even without the underlying judicial findings which exist here, the focus here as in Weber is on a negotiated agreement designed to eliminate the effects of past discriminatory practices. In contrast with Weber, the fruits of the negotiations were codified, not in a collective bargaining agreement, but in a series of consent decrees. When the passage of time and an unforeseen change in the economic climate threatened the parties' initial agreements, the plaintiffs sought to modify the original agreements to preserve the original intent of the parties. The result was the modified consent orders at issue here which were approved by the district court without opposition from the City of Boston or its Police and Fire Commissioners, none of whom has ever con-

tested the validity or propriety of the modified consent decrees at any level of these proceedings.

Thus, this case does not involve the power of a district court to impose a remedy on unwilling defendants. Rather, it raises the narrow issue of the power of the parties to enter into a consensual remedial plan which is subject to judicial enforcement, and which was judicially enforced without opposition from the original parties. As with the consensual agreement in Weber, no provision of law forbids the implementation of such a remedial decree, despite its temporary collateral effect on an existing seniority system.

A. Apart from the judicial findings of past discrimination, the central fact in this case is that the proportionate layoff plan was a product of judicial enforcement of a series of mutually agreed upon

consent decrees. Since a consent order may be construed by looking to "the circumstances surrounding the [consent] order and the context in which the parties were operating," and may be enforced "without reference to the legislation the [plaintiff] originally sought to enforce," United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37, 243 (1975), and since a court is empowered to modify a decree in adaption of changed conditions particularly where the original decree has not been satisfied, United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968), the proportionate layoff plan in the modified decrees must be upheld since it "served to effectuate" rather than "to thwart the basic purpose of the original consent decree[s]," Chrysler Corp. v. United States, 316 U.S. 556, 562 (1942).

B. Whether the proportionate layoff plan is viewed as an unopposed modification of the consent decrees, as the embodiment of a negotiated agreement to remedy past racial wrongs, or as a court imposed bar to the nullification of necessary judicial remedies for past discrimination, it was lawful under Title VII. As in Weber, 443 U.S. at 208-09, the plan advanced the basic purpose of Title VII while not unnecessarily trammeling the interests of white employees since it was a racially proportionate temporary plan which did not require the replacement of white employees with new minority hirees and did not act as a bar to the advancement of whites.

C. From whichever of the foregoing perspectives the proportionate layoff plan is viewed, it satisfied the strict constitutional standards of Regents of the University of California v. Bakke,

438 U.S. 265 (1978), and Fullilove v. Klutznick, 448 U.S. 448 (1980), since the proportionate plan advanced a compelling state interest by protecting the operational needs of public safety departments to provide nondiscriminatory and effective services to all residents of the community; because the plan preserved at least in part the unachieved remedies for judicially determined past discrimination; and because the plan was reasonably used and narrowly tailored to achieve those objectives.

ARGUMENT

I. The District Court Applied the Correct Legal Standards in Approving A Necessary Modification of the Consent Decrees, Especially in the Absence of Opposition From the City of Boston or its Police and Fire Commissioners

Although the consent decrees in these cases were preceded by several years of litigation and by judicial findings of past discrimination against minorities, a central fact in these cases is that the parties

reached a compromise[1/] through the entry of a series of consent decrees. Also central to these cases is the fact that the parties' stated objective in the consent decrees -- requiring the public safety departments to employ blacks and hispanics through affirmative measures until their employment representation was commensurate with the 23%

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1. The nature of a consent agreement, at least one reached prior to trial court adjudications and appellate court affirmances, has been aptly described by this Court:

> The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971); see also, United States v. ITT Continental Baking Co., 420 U.S. 223, 235 (1975). Of course here, where the public safety departments' liability had already been determined and affirmed, the plaintiffs' risks were relatively minimal while the departments' risks -- particularly the financial risks of being subject to a back-pay remedy, were correspondingly substantial.

minority representation in the community -- had not been achieved at the time of the unanticipated financial crisis which precipitated unforeseen layoffs; and the fact that neither the City of Boston nor its Police or Fire Commissioners opposed the modified consent decrees at issue in this case.

These central facts in many respects place the modified consent decrees here on an even stronger ground than was the race conscious numerical program upheld by this Court in United Steelworkers of America v. Weber, 443 U.S.193 (1979). First, the objective of the parties to these consent decrees was virtually identical to the employer's objective in adopting the numerical program upheld in Weber. Similar to the manner in which the Kaiser Aluminum & Chemical Corp. in Weber sought to limit its financial back-pay liability by imple-

menting prospective numerical relief, the public safety departments here actually avoided all financial risk by entering into consent decrees which required prospective numerical relief. See supra at 9 n.1.

Second, the voluntary relief in Weber and the consent decree relief here are examples of "private ordering" which are subject to a wholly different standard of review than would be applied to a remedy imposed upon a recalcitrant party. In approving the prospective relief in Weber, the Court was "not concerned with what Title VII requires or with what a court might order to remedy a past proved violation." 443 U.S. at 200. Here, because "consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the [plaintiffs] originally sought to enforce."

United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37 (1975). Moreover, in determining whether a court abused its power in modifying a consent decree, "the test to be applied in answering this question is whether the change served to effectuate or to thwart the basic purpose of the original consent decree." Chrysler Corp. v. United States, 316 U.S. 556, 562 (1942).

A. At the outset, there simply is no question that a court is empowered to enforce its decrees through specific performance or further injunctive relief, as well as to enforce its decrees through modification so as to effectuate the decrees in light of unanticipated events.

1. As stated by Justice Jackson nearly a century ago: "it is well settled that a court of equity has jurisdiction to

carry into effect its own orders, decrees, and judgments." Root v. Woolworth, 150 U.S. 401, 410 (1893). In fact, it "is well settled" that a federal court is empowered not only to enforce its decrees but also "to secure or preserve the fruits and advantages of a judgment or decree," Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934), even if preservation of those fruits and advantages requires an injunction against state proceedings inconsistent with the decree, id.; see also, Dugas v. American Surety Co., 300 U.S. 414, 429 (1936) (approval of a federal court injunction against inconsistent state proceedings as within "the power of a federal court to protect its jurisdiction and decrees").

2. There similarly is no question that a federal court is empowered to modify a decree both to take into account

previously unforeseen conditions as well as to achieve the objectives originally sought by the decree. As Justice Cardozo wrote for the Court: "We are not doubtful of the power of a court of equity to modify an injunction in adaption of changed conditions though it was entered by consent." United States v. Swift & Co., 286 U.S. 106, 114 (1932). This principle, Justice Cardozo pointed out, is unaffected by the absence in the consent decree of any mention of future modification:

> If the reservation had been omitted, power there still would be by force of principles inherent in the chancery. A continuing decree of junction directed to events to come is subject always to adaption as events may shape the need.

Id. These principles, this Court subsequently held in its unanimous decision in United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968), apply with even greater vitality where it is the plaintiffs who seek

modification of a decree whose objectives have not yet been satisfied. In fact, where the objectives have not yet been achieved, "the District Court should modify the decree so as to achieve the required result with all appropriate expedition." Id. at 252 (emphasis added).[2/]

3. Finally, in construing a consent order for enforcement purposes, this Court has made clear that the courts should look not only to the language of the decree but also to "the circumstances surrounding the order and the context in which the parties were operating." United States v.

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2. The district court's power to modify is, of course, enhanced where, as here, the primary opposing parties do not object to the modification. Thus, when plaintiffs request a court to modify a consent decree to take account of unforeseen changed circumstances and the primary opposing parties do not object, the court's power is at its apogee. In a real sense, the court acts, not as a lawgiver imposing a remedy on unwilling defendants, but as a facilitator, acting to codify and implement the shared goals of the parties.

ITT Continental Baking Co., 420 U.S. 223, 243 (1975). Moreover, as we have already pointed out, the courts "need not, however, determine whether" the underlying statutes under which the litigation was initially brought "would permit" the enforcement sought "[s]ince a consent decree or order is to be construed for enforcement purposes basically as a contract." Id. at 238.

B. In employment discrimination litigation -- where this Court[3] as well as the lower federal courts[4] have expressed a distinct preference for voluntary resolution of disputes, and where disputes accordingly are frequently resolved through the entry of

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3. See, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367-68 (1977); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

4. See, e.g., the list of Fifth Circuit cases cited in United States v. Miami, 614 F.2d 1322, 1331-32 (5th Cir. 1980), modified en banc, 664 F.2d 435 (5th Cir. 1981); Patterson v. Newspaper & Mail Deliverers' Union of New York, 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976).

consent decrees -- the courts in general, like the courts below, have been mindful of the foregoing principles in protecting the integrity of consent decrees.

1. In contexts similar to that here, where the decrees have an impact on the expectations of white workers, not only have the courts rejected subsequent third-party challenges to the original decrees as impermissible collateral attacks,[5/] but the courts have also carefully weighed the competing rights and expectations, and generally enforced the consent decrees through modifications thereof and through supplemental orders in order to protect the integrity of the decrees in changed condi-

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5. See, e.g., Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982); Dennison v. Los Angeles, 658 F.2d 694 (9th Cir. 1981); Prate v. Freedman, 430 F. Supp. 1371 (W.D.N.Y.), aff'd, 573 F.2d 1294 (2d Cir. 1977), cert. denied, 436 U.S. 922 (1978); O'Burn v. Shapp, 70 F.R.D. 549 (E.D. Pa.), aff'd, 546 F.2d 418 (3d Cir. 1976), cert. denied, 430 U.S. 968 (1977).

tions, Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982) (modification barring disproportionate layoffs in view of unanticipated layoffs on the basis of seniority which would have eviscerated the minority employment gains made under the objectives of the consent decree); Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981) (same); Sarabia v. Toledo Police Patrolman's Ass'n, 601 F.2d 914 (7th Cir. 1979) (modification suspending a civil service rule which unexpectedly obstructed the minority hiring objectives of the consent decree); EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978) (supplemental order requiring more expeditious hiring and promotion of minorities and women, requiring the hiring and promotion exclusively of minorities and women into specified job classifications, and providing for an affirmative action override of certain

collective bargaining agreements); Bolden v. Penn. State Police, 73 F.R.D. 370 (E.D. Pa. 1976), aff'd, 578 F.2d 912 (3d Cir. 1978) (modification increasing the interim minority hiring ratios in view of the defendant's unanticipated failure to make progress toward the minority employment goal in the consent decree).

2. As in the foregoing cases, the trial court here was mindful of this Court's rulings empowering the trial court to enforce through modification the integrity of the decrees in these cases. In fact, as the trial court found in these cases, since the unanticipated straight seniority layoffs "would nullify" the remedial consent orders, "modification of those prior remedial orders through entry of the within order is necessary to prevent that consequence." 522 F. Supp. at 877.

C. In sum, the courts in these cases correctly perceived that the public safety departments had escaped financial liability by agreeing to prospective relief in the judicially enforceable consent decrees, and that they should not be totally excused from their contract because of unforeseen economic conditions. In fact, the reasonableness of the trial court's accommodation -- restraining only disproportionate layoffs of minority officers rather than restraining all minority layoffs -- appears to have been recognized by the contractually bound public safety departments who, possibly in recognition of their operational needs of providing public safety services to all residents of the Boston community, neither opposed the enforcement modification in the lower courts nor oppose it in this Court.

Enforcement of the decrees, regardless of Title VII law and of equal protection

principles, was entirely reasonable and must be affirmed since it served to effectuate rather than to thwart the basic purpose of the existing consent decrees.

II. The Modified Consent Decrees Did Not Violate Title VII

The modified consent decrees at issue are most properly viewed as necessary and unopposed modifications of existing consent decrees and, as such, they are clearly valid for the reasons just stated. It is possible, however, to view the modified decrees in two other ways: as the embodiment of a negotiated agreement between plaintiffs and the employer defendants; or as a judicially imposed remedy for past discrimination. Viewed from the legally more difficult latter perspective, the decrees must comply with -- and they did comply with -- both the restrictions on race-conscious remedial plans set forth in Weber, 443 U.S. 193, and the statutory limitations in Title VII.

A. The Modified Consent Decrees Satisfied the Guidelines for Race Conscious Affirmative Action Plans Established in Weber

In Weber, this Court upheld a voluntary race-conscious affirmative action plan designed to redress the effects of past racial discrimination despite its adverse effect upon pre-existing seniority expectations. The Court upheld the race-conscious plan in Weber because: (1) the purpose of the plan mirrored the purpose of Title VII itself; and (2) the plan did not unnecessarily frustrate the expectations of white employees since: (a) it did not require the discharge of white employees to be replaced with new minority hirees; (b) it did not create an absolute bar to the advancement of white employees; and (c) it was a temporary measure. 443 U.S. at 208-09.

The race-conscious plan embodied in the modified consent decrees fell squarely within the Weber guidelines.

1. The modified consent decrees unquestionably served the purposes underlying Title VII since the "need to break down old patterns of racial segregation and hierarchy," Weber, 443 U.S. at 208, is even more apparent here given the explicit judicial findings of racial discrimination which preceded the decrees.[6/] Indeed, the legacy of proven discrimination in hiring public safety officers in Boston suggests that a failure to have approved the modified decrees would have placed the district court in the untenable position of reinforcing the very discrimination it had condemned.

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6. Justice Blackmun's suggestion of an "arguable violation" standard as prerequisite to race-conscious relief highlights this recognition of the greater justification for such measures where the inference of an employer's prior discrimination is more compelling. See Weber, 443 U.S. at 209-16 (Blackmun, J., concurring); see also, Bakke, 438 U.S. at 366 n.42 (opinion of Brennan, J., with White, Marshall and Blackmun, J.J., concurring in part and dissenting in part) ("We agree that reversal in this case would follow a fortiori had Davis been guilty of invidious race discrimination.").

2. Nor did the modified consent decrees unnecessarily trammel the legitimate expectations of even the most "innocent" white employees since the seniority expectations affected by the remedial decrees were, in a real sense, attributable to the unfair advantage historically afforded to whites by the unlawful and long-standing exclusion of minorities from the employee pool. Cf. Fullilove, 448 U.S. at 484-85 (opinion of Burger, C.J., with White and Powell, JJ.) ("Although we may assume that the complaining parties are innocent of any discriminatory conduct . . . non minority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities"); Bakke, 438 U.S. at 365 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) ("Where an employer has violated an anti-discrimination law, the expectations of non-minority

workers are themselves products of discrimination and hence 'tainted' and therefore more easily upset") (citations omitted). In seeking to assure that layoffs did not fall with disproportionate effect on newly hired minority workers, the district court merely protected the original remedial consent decrees against the lingering effects of decades of unlawful discrimination. See Neuborne, Observations on Weber, 54 N.Y.U.L. Rev. 546, 549 (1979).

a. The modified decrees did not require the discharge of any white employees; in fact, the decrees did not mandate or otherwise suggest the layoff of anyone, see Tangren v. Wackenhut Services, 480 F. Supp. 539, 549 (D. Nev. 1979), aff'd, 658 F.2d 705 (9th Cir. 1981), cert. denied, 102 S.Ct. 1771 (1982), much less the replacement of white employees with new minority hirees. Given the myriad alternatives open to public employers such as the City of Boston,

the fact that the pain of layoffs would be borne by whites as well as minorities often produces an almost magical infusion of funds, rendering layoffs unnecessary. Indeed, once the courts below made it clear that layoffs could not fall with disproportionate effect on minority employees, the Massachusetts Legislature discovered the funds to rehire every employee.

b. The decrees also did not interject any bars or obstacles, absolute or otherwise, to white advancement. Instead, as the First Circuit below properly observed, "[a]ll they [did was] preserve the status quo at a 14.7 percent minority ratio for firefighters and an 11.7 percent for police . . . [a]gainst a background of a present 30 percent minority population in Boston," 679 F.2d at 977.

c. Finally, the decrees were temporary, and certainly were not -- contrary to petitioners' assertions -- attempts permanently to maintain racial balance, or to award permanent constructive seniority. In fact, with the passing of the fiscal crisis which precipitated the layoffs, there for some time have been no laid-off officers at all.

Thus, since the modified decrees were necessary to effectuate the basic purpose of Title VII and were narrowly tailored to remedy proven racial discrimination with minimum interference with the expectations of white employees, they comfortably met the Weber guidelines.[7/]

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7. This conclusion is reinforced by the judgment of each of the courts of appeals that has addressed the post-Weber legality of temporary race-conscious relief, whether such relief came about as an entirely voluntary measure, Tangren, 658 F.2d 705; in attempted compliance with Executive Order 11246,

[footnote 7 continued on next page]

B. Judicial Acceptance of the Modified Consent Decrees Was Not Prohibited by Section 703(h)

Even if the modified consent decrees here are viewed solely as a judicial exercise of remedial power subject to Title VII constraints, the decrees were lawful despite their impact upon seniority expectations.

Petitioners, by asserting that the relief here is barred by § 703(h), obfuscate a distinction this Court made painstakingly plain in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), and in Int'l Bhd. of

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[footnote 7 continued from previous page] Sisco v. J.S. Alberici Const. Co., 655 F.2d 146 (8th Cir. 1981), cert. denied, 102 S.Ct. 1485 (1982); as a result of a court-ordered remedy for prior proven discrimination, Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982), cert. denied, 51 U.S.L.W. 3254 (1982); or in the context of modification of consent decrees, whether or not preceded by prior judicial findings of discrimination, Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982) (no prior findings of discrimination); Brown v. Neeb, 644 F.2d 551 (6th Cir. 1982) (prior findings as to police department but not as to fire department).

Teamsters v. United States, 431 U.S. 324 (1977), between the exemption from Title VII's prohibitions accorded bona fide seniority systems in § 703(h) and the federal courts' equitable and remedial authority to fashion and approve relief affecting aspects of seniority. Section 703(h) is "only a definitional provision," delineating "which employment practices are illegal and thereby prohibited and which are not." Franks, 424 U.S. at 758.

Accordingly, under § 703(h), maintenance of a bona fide seniority system is in itself legal, even though it may perpetuate the effects of past illegal discrimination through its disparate distribution of seniority benefits, Teamsters, 431 U.S. at 353-54; and only direct challenges to the legality of such seniority systems -- an approach never pursued in the instant cases -- are precluded by § 703(h). However,

"[s]ection 703(h) certainly does not . . . qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706(g)." Franks, 424 U.S. at 758.

C. The Modified Consent Decrees Were Authorized Under Title VII's Remedial Provision, § 706(g)

Even viewing the modified consent decrees here, once again, solely as an exercise of judicial power subject to Title VII's constraints, the decrees were lawful both because race-conscious affirmative relief is expressly authorized by § 706(g) and because the temporary relief here was not an award of permanent "make whole" constructive seniority.

1. This Court has frequently recognized the broad congressional grant of power given to federal courts under §

706(g). See, e.g., Teamsters, 431 U.S. at 364; Franks, 424 U.S. at 770; Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). Underlying this recognition is both Congress' express ratification of the use of race-conscious remedies not merely limited to the identifiable victims of an employers' racial discrimination but designed to benefit minorities as a group, and the consistent approval of this remedial power by the courts of appeals.

a. In 1971 and 1972, when Congress debated the propriety of race-conscious remedies under Title VII and ultimately amended and strengthened Title VII, Congress not only approved the then-existing case law in which the courts had imposed broad race-conscious remedies, but also expressly rejected amendments to Title VII which would have prevented the imposition

of race-conscious relief. See, e.g., the discussion of the 1971-72 legislative history of § 706(g) set forth in United States v. Int'l Union of Elevator Const'rs, 538 F.2d 1012. 1019-20 (3d Cir. 1976); see also, EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 176-77 (3d Cir. 1977) (discussion of the 1971-72 legislature history and of 1964 legislative history of § 706(g) and particularly of that section's last sentence), cert. denied, 438 U.S. 915 (1978). In view of this conclusive legislative history, which we have previously cited to this Court,[8/] there can be little doubt about the permissibility of broad race-conscious remedies under § 706(g).

b. Consistent with this legislative history, those courts of appeals

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8. See Brief of the American Civil Liberties Union and of the Society of American Law Teachers, Amici Curiae, 74-89, filed in Weber, 443 U.S. 193 (1979).

which have viewed the § 706(g) authority issue raised here by petitioners and by the United States as amicus curiae have uniformly and correctly held that § 706(g) authorizes the imposition of broad race-conscious affirmative remedies.[9/]

2. In view of the remedial authority granted by § 706(g), the temporary race-conscious relief contained in the modified consent decrees here -- even if viewed as court imposed -- did not run afoul of this Court's allowance in Franks and Teamsters of permanent "make whole" relief only to identifiable victims of an employer's discrimination. The minority

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9. See the cases collected in United States v. Int'l Union of Elevator Const'rs, 538 F.2d 1012, 1020 (3d Cir. 1976), and in United States v. Chicago, 549 F.2d 415, 436-37 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1978); see also, e.g., United States v. Masonry Contractors Ass'n, 497 F.2d 871, 877 (6th Cir. 1974); United States v. Local No. 212, IBEW, 472 F.2d 634, 636 (6th Cir. 1973).

employees here, even those who are unquestionably entitled to such extraordinary permanent measures, sought and received only temporary, proportionate relief plainly within the broad scope of § 706(g).

The partial, prospective, and temporary relief here was entirely unlike the complete, retroactive, and permanent make-whole relief of competitive status seniority, benefit seniority, and back pay[10/] which was

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10. As this Court recognized in Franks, employees entitled to a "make-whole" remedy by virtue of an employer's discrimination may receive extraordinary relief, including awards of "competitive-status" seniority (allocating scarce benefits among competing employees); "benefit" seniority (awarding non-competitive benefits earned over time under an employment contract) and back pay retroactive to the date of the discriminatory decision. 424 U.S. at 764-67. In addition to relief affecting layoff structure, awards of "competitive-status" seniority permanently redistribute priorities affecting promotions, transfers, demotions, rest-days, shift assignments, job and travel assignments, vacation, scheduling, training opportunities, working conditions, overtime opportunities, parking privileges and the like. Id. at 766-67.

"Benefit" seniority requires substantial payouts of benefits by the employer including pension benefits, health benefits, fringe benefits, unemployment insurance, vacation time and sick leave, id., in addition to direct monetary back-pay payments.

sought and allowed in Franks and Teamsters. The mere fact that this very limited relief had an impact on seniority -- a proportional impact designed only to prevent nullification of the plainly authorized numerical hiring relief -- did not place it in contravention of § 706(g).

In fact, not only was the proportional relief here consistent with Congress' broad grant of remedial authority under § 706(g), see supra at 30-33, but it also was consistent with § 703(h) since "the legislative history of § 703(h) plainly negates its reading as limiting or qualifying the relief authorized under § 706(g)," Franks, 424 U.S. at 758-59. Moreover, the limited relief here certainly was entirely consistent with Congress' power to provide race-conscious numerical remedies to unidentified victims of past exclusionary practices. Fullilove, 448 U.S. 448; Bakke, 438 U.S. at

302 n.41 (opinion of Powell, J.); id. at 363-64 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.).

III. The Modified Consent Decrees Did Not Violate Equal Protection of the Laws

As we have noted, it is possible to view the modified consent decrees from three perspectives: as necessary modifications of existing consent decrees, subject to extremely relaxed standards of review; as the embodiment of a negotiated agreement to remedy past racial wrongs, subject to the guidelines for voluntary activity set forth in Weber; or as a court-imposed remedy for past racial discrimination, subject to the limitations set forth in Bakke and Fullilove. Even when viewed against the most stringent standard of constitutional review, the proportionate layoff plan was constitutional both because it satisfied

the compelling operational needs of providing effective public safety services to the entire community, and because it was a permissible remedial measure designed to redress judicially determined unlawful discrimination in hiring.[11/]

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11. Because the police case was filed and litigated to a consent judgment under 42 U.S.C. § 1981 and § 1983 (and not under Title VII), and since the fire case similarly was filed and litigated through to a series of consent decrees under 42 U.S.C. § 1981 and § 1983 (with only the United States invoking Title VII in its separately filed but later consolidated lawsuit), whatever Title VII constraints might arguably apply to the formulation of a remedy in a pure Title VII case, but see supra at 28-36, no such statutory constraints apply to the modified consent decrees in this § 1981 and § 1983 litigation.

The courts are broadly empowered in § 1983 lawsuits to award all appropriate equitable and legal remedies, Carey v. Piphus, 435 U.S. 247 (1978), and in § 1981 lawsuits similarly to award all appropriate "equitable and legal relief, including compensatory and, under certain circumstances, punitive damages," Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975).

The enactment of Title VII did not and does not affect the broader relief available in § 1981 and § 1983 lawsuits: "the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." Id. at 459. This applies to

[footnote 11 continued on next page]

A. Numerical Remedies, as Explained in Bakke and Fullilove, May Be Used to Satisfy a Substantial or Compelling Government Need as Well as to Remedy the Effects of Past Discrimination

1. This Court recognized in Bakke, 438 U.S. 265, that a race-conscious numerical program would be constitutional so long as it could be justified by the operational needs of government. Four members of this Court in Bakke expressly held that such a program would be constitutional so long as it served "important government objectives and [was] substantially related to achievement of those

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the broader availability not only of legal remedies but also of equitable remedies: for example, "a backpay award under § 1981 is not restricted to the two years specified for backpay recovery under Title VII." Id. at 460. In sum, the broader § 1981 and §1983 "remedies . . . are separate, distinct, and independent" from those available under Title VII. Id. at 461; cf., Carlson v. Green, 446 U.S. 14 (1980) (plaintiff may pursue broad constitutional remedies without being limited to only the statutory remedies in the Federal Tort Claims Act).

objectives. Id. at 359 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.). A fifth member of the Court, Justice Powell, "assumed that in some situations a [government's] interest in facilitating the health care of its citizens [here, the public safety of its citizens] is sufficiently compelling to support the use of a suspect classification." Id. at 310.

2. The Bakke Court also recognized that race-conscious remedies are permissible to redress past discrimination, since it had long "been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stance." Id. at 362 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) (emphasis added); see also, id. at 300-302 (opinion of Powell, J.).

In fact, as a result of Bakke and Fullilove, 448 U.S. 448, numerical remedies, such as the proportionate layoff plan here, may encompass nonvictims of past discrimination, and even may be used in the absence of any adjudicated past discrimination.

a. Four members of this Court in Bakke held that a strict numerical program is justifiable and constitutional in certain circumstances so long as it is based on the "articulated purpose of remedying the effects of past societal discrimination." 438 U.S. at 362 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.). In reaching this result, the Justices pointed out that prior Supreme Court decisions supported the conclusion that the minority individuals benefiting from such a numerical program need not "have been individually discriminated against" as "it is enough that each recipient is within a general class of persons likely to have

been the victims of such discrimination." Id. at 363. Additionally, numerical programs need not be preceded by or premised upon "judicial findings of discrimination, for race-conscious remedies have been approved where such findings have not been made," and since any "requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self defeating" and contrary to our "jurisprudence." Id. at 364.

Although disagreeing with the conclusion that a strict numerical program could be constitutionally justified as a remedy for past societal discrimination, Justice Powell in his separate opinion in Bakke agreed that judicially or administratively approved numerical programs could properly encompass nonvictims of the past discrimination and that such programs need not be based

upon judicial findings of past discrimination. Relevant to both points of agreement is Justice Powell's express reliance on the administratively "fashioned remedies," id. at 301-302, approved by the courts of appeals in Contractors Ass'n of Eastern Penn v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), and Associated Gen. Contractors of Mass. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974), decisions approving administratively imposed remedies which widely encompassed nonvictims and which in fact were premised on no express administrative or judicial findings of past discrimination. As to the permissible scope of remedial measures, Justice Powell also cited with approval, Bakke at 301, two cases -- brought against public safety departments solely under § 1981 and § 1983 -- in which the courts of appeals expressly

approved court-ordered numerical remedies which included nonvictims of the discrimination: Bridgeport Guardians v. Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975); and Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), modified on rehearing en banc, 452 F.2d 327 (8th Cir.), cert. denied, 406 U.S. 950 (1972).[12/]

Subsequent to Bakke, the federal courts of appeals have consistently read Bakke as

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12. In Carter, 452 F.2d 327, the Eighth Circuit en banc expressly acknowledged that there were no identifiable victims of discrimination who would be necessarily involved in the numerical relief. 452 F.2d at 328; see also 452 F.2d at 325-36 (panel opinion). Since this was not controlling in the fashioning of appropriate equitable relief to remedy past racial discrimination, the en banc court concluded that the Minneapolis Fire Department should thereafter hire one minority for every two whites hired until the overall hiring goal was met. 452 F.2d at 331.

The Second Circuit in Bridgeport Guardians, 482 F.2d 1333, approved similar hiring ratios which also included nonvictims of the discrimination practiced by the Bridgeport Police Department. 482 F.2d at 1339-41.

authorizing the use of numerical programs encompassing nonvictims of discrimination whether the programs were undertaken voluntarily to remedy minority underrepresentation,[13] undertaken in response to administrative findings of discrimination,[14] or judicially ordered to remedy past discrimination.[15]

b. Confirming the correctness of the conclusions set forth in Bakke, the Court two years later in Fullilove, 448 U.S. 448, upheld the constitutionality of a numerical set aside for minority business enterprises in government contract-

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13. E.g., Local 35, IBEW v. Hartford, 625 F.2d 416, 422-24 (2d Cir. 1980), cert. denied, 453 U.S. 913 (1981).

14. E.g., Valentine v. Smith, 654 F.2d 503, 507-09 (8th Cir. 1981), cert. denied, 102 S.Ct. 972 (1982); Caulfield v. Bd. of Educ. of City of New York, 632 F.2d 999 (1980), cert. denied, 450 U.S. 1030 (1981).

15. E.g., Firefighters Institute for Racial Equality v. St. Louis, 588 F.2d 235, 239 (8th Cir. 1978), cert. denied, 443 U.S. 904 (1979); Morrow v. Dillard, 580 F.2d 1284, 1292-94 (1978).

ing, fully recognizing that the numerical program was based upon minority underrepresentation rather than upon any judicial, administrative or legislative findings of past discrimination against minority contractors.[16/]

Paralleling their views in Bakke, Justices Marshall, Brennan and Blackmun held in Fullilove that the MBE set aside was "clearly constitutional" since it served to remedy the reality that minority contractors had "received a disproportionately

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16. Although the two plurality opinions in Fullilove which provided the majority judgment upholding the MBE numerical program do make reference to correcting past discrimination in the construction industry, 448 U.S. at 453-92 (opinion of Burger, C.J., with White and Powell, JJ.), and 448 U.S. 517-22 (opinion of Marshall, J., with Brennan and Blackmun, JJ.), the dissenting opinion of Justice Stewart joined by Justice Rehnquist accurately points out that there was absolutely "no evidence that Congress [had] in the past engaged in racial discrimination in its disbursement of federal contracting funds." 448 U.S. at 528; see also, 448 U.S. at 528 n.8 ("The legislative history of the MBE provision itself contains not one mention of racial discrimination or the need to provide a mechanism to correct the effects of such discrimination.").

small amount of public contracting business." Id. at 520.

Chief Justice Burger, joined by Justices White and Powell, employed a similar analysis in Fullilove while also pointing out that the numerical program was "a strictly remedial measure," a "remedy that functions prospectively, in the manner of an injunctive decree." Id. at 481.

B. The Modified Consent Decrees Embodying the Proportionate Layoff Plan Were Constitutionally Justified

Under the applicable constitutional tests,[17/] the proportionate layoff plan in

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17. See supra at 38-39. In addition there should be an inquiry as to whether a numerical program "stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives." Bakke, 438 U.S. 265, 373-74 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.); see also, Fullilove, 448 U.S. 448, 517-22 (opinion of Marshall, J., with Brennan and Blackmun, JJ.). A similar test, announced by three Justices in Fullilove, requires that a reme-

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the modified consent decrees fulfilled substantial and compelling governmental public safety objectives in addition to preserving in part the unachieved prior remedies for judicially determined past discrimination; they also were narrowly tailored and reasonably used; and they stigmatized no discrete group or individual.

1. Not only did the modified consent decrees serve to remedy undisputed past discrimination,[18] but they fulfilled

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[footnote 17 continued from previous page] dial program be "narrowly tailored to the achievement of [the remedial] goal." 448 U.S. at 480 (opinion of Burger, C.J., with White and Powell, JJ.); see also, Justice Powell's opinions in Bakke, 438 U.S. at 305, 314-15, and in Fullilove, 448 U.S. at 498-99.

18. Petitioners' argument, based on Washington v. Davis, 426 U.S. 229 (1976), and on Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977), that the trial court was powerless to modify the disproportionate layoffs because the original findings of past discrimination in these § 1981 and § 1983 cases had not included findings of intentional discrimination, is frivolous. Apart

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the compelling governmental needs of achieving at least partially integrated

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from the fact that race-conscious numerical measures may be adopted or imposed without judicial intervention, see discussion supra at 39-46, petitioners overlook both the consent decrees and the evidentiary record in these cases.

The First Circuit below correctly rejected petitioners' argument based on the indisputable fact that "the pattern of relief which the modification in the decrees seek to preserve was conclusively established prior to [Washington v. Davis and Arlington Heights]." 679 F.2d at 971. Like the First Circuit, and like the Sixth Circuit in another § 1981 and § 1983 case, Sarabia v. Toledo Police Patrolman's Ass'n, 601 F.2d 914 (6th Cir. 1979), we find it "hard to understand how these decisions [Washington v. Davis and Arlington Heights] could be applied to a case involving a consent decree" since, regardless of evidentiary matters "the parties agreed that certain steps should be taken;" and since, "whatever may have been the understanding of the parties with respect to the requirements for proving a constitutional violation at the time of the decree, they all agreed upon a course of conduct to bring about a better representation of minority groups on the Toledo police force," and "this agreement was solemnized at their request by entry as an order of the district court." 601 F.2d at 919. See also Bolden v. Penn. State Police, 73 F.R.D. 370, 371-72 (E.D. Pa. 1976), aff'd, 578 F.2d 912 (3d Cir. 1978); cf., Dawson v. Pastrick, 600 F.2d 70, 76 (7th Cir. 1979) ("To allow post-approval changes or clarifications in the law to upset a settlement would be contrary to the established policy of encouraging settlements and

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public safety forces in a racially mixed urban setting. Bitter experience has

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frequently would allow a party to back out of a bargained-for position after agreement had been reached.").

Even if the consent decrees did not exist in these cases, the First Circuit below pointed out that it was "by no means clear" that its previous liability decisions "in the police and fire cases should have been different had they been decided after Washington v. Davis and Arlington Heights." 679 F.2d at 971. In fact, there was considerable evidence in the original trial court records from which the courts could have inferred from the totality of the circumstances -- based upon the subsequent intent standards -- that the discrimination practiced against minorities by the public safety departments had been purposeful. For example, there had been an historic exclusion of minorities from the public safety departments resulting in severe racial imbalance, 334 F. Supp. at 935 (police case); 371 F. Supp. at 514 (fire case); and racial "imbalance is often a telltale sign of purposeful discrimination," for "it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired," Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n. 20 (1977). Additionally, the selection examinations had a decidedly discriminatory impact, 334 F. Supp. at 941-42 (police case); 371 F. Supp. at 513-14 (fire case); and "[i]t is also not infrequently true that the discriminatory

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taught us that all white police and fire departments cannot function effectively in a racially mixed urban environment. Where, as here, a race-conscious remedial plan was necessary to prevent the re-segregation of Boston's police and fire departments, the court's modified decrees were well within constitutional standards.

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impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds," Washington v. Davis, 426 U.S. 229, 242 (1976). Further, at least some of the "discriminatory consequences" "were foreseeable," 334 F. Supp. at 943 (police case); and "proof of foreseeable consequences is [another] type of quite relevant evidence of racially discriminatory purpose," Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n. 9 (1979).

In sum, even if the original police and fire cases had been tried under intent standards, it is by no means clear that the courts' liability decisions would have been any different. In the final analysis, however, this speculation is irrelevant since the original decrees were consent decrees, and since the original decrees in any event are not now subject to collateral attack, see supra at 17 n. 5.

a. The First Circuit here quite properly found that "[a]n important factor in these cases is that they involve the police and fire departments of a large metropolitan city that now has a minority population of at least 30 percent," and also quite correctly observed that the court did "not need expert testimony to make the point that, unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it most." 679 F.2d at 977.

The compelling operational needs for greater minority employment by public safety departments, the Sixth Circuit recently observed, "is not simply that blacks communicate better with blacks," but:

> Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.

Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981); quoted with approval by the Fourth Circuit in Talbert v. Richmond, 648 F.2d 925, 931 (4th Cir. 1981), and also by the First Circuit in these cases, 679 F.2d at 977.

The reality of these operational needs of urban public safety departments has been relied on increasingly by the federal courts subsequent to Bakke as a substantial or compelling justification for race-

conscious employment programs.[19/] In fact, even prior to Bakke two courts of appeals held that the operational needs of public safety departments provided at least part of the justification for

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19. See Talbert v. Richmond, 648 F.2d 925, 928 (4th Cir. 1981) (Judge Butzner, with Judges Field and Hall) (approving "the operational needs of the police department [of] achieving diversity among the officers" as particularly "important to effective law enforcement in a city whose population was approximately 50% black"); Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 678-80, 695-96 (6th Cir. 1979) (Judge Lively, with Judges Celebrezze and Merritt) (relying on the operational needs of increasing the employment of minority officers); Baker v. Detroit, 483 F. Supp. 930, 995-1000 (E.D. Mich. 1979) (Judge Keith) (citing instance after instance in which the presence of minority officers actually decreased racial tension and prevented inflamatory incidents while improving community cooperation and increasing the level of effective crime prevention); Doores v. McNamara, 476 F. Supp. 987, 991 (W.D. Mo. 1979) (Judge Clark) (finding that in Kansas City "there had been a serious race riot in 1967," "that this riot might have been prevented had there been a more representative representation of minorities [particularly blacks] on the police force," and "that the efficiency of any metropolitan police force and peaceful solution within such area would be greatly enhanced by having as near as possible the same percentage of minorities on the police force as that which they represented in the community population").

approving race-conscious numerical measures.[20]

b. This recognition of the close correlation between the effective delivery of public safety services and the employment of significant numbers of minority public safety officers in our nation's urban centers is not just a judicial recognition nor is it a recognition of recent vintage. Instead, as summarized by the Sixth Circuit in Detroit Police Officers Ass'n, 608 F.2d at 695:

> It is based on law enforcement experience and a number of studies conducted at the highest levels. E.g., National Advisory Commission on Criminal Justice Standards and Goals, Police (1973); National Commission on the Causes and Prevention of Violence, Final Report: To Establish Justice, To Insure Domestic Tranquility (1969); Report of the National Advisory Commission on Civil Disorders

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20. NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974); Bridgeport Guardians v. Members of Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975).

(1968); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (1967). As these reports emphasize, the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact. See To Establish Justice, supra at 300 (New York Times edition). It is critical to effective law enforcement that police receive public cooperation and support. Report on Civil Disorders, supra at 301; Task Force Report: The Police, supra at 144-45, 167; Police, supra at 330.

These national commissions recommended the recruitment of additional numbers of minority police officers as a means of improving community support and law enforcement effectiveness. In fact, the benefits of Negro officers were recognized as early as 1931 by the "Wickersham Commission." Report on the Causes of Crime 242, National Commission on Law Observance and Enforcement (Vol. I, 1931).

In 1967, a presidential commission stated the proposition offered by the [Detroit Police Department] defendants in this case:

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be

> representative of the community as a whole. Task Force Report: The Police, supra at 167.

This need extends to the higher ranks in police departments, such as the rank of sergeant involved in this case:

> If minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policy-making and other crucial decisions. Id. at 172.

The presence of a mostly white police force in minority communities can be a "dangerous irritant" which can trigger, as it did in Detroit in 1967, a violent response. Report on Civil Disorders, supra at 315, 120; see also id. at 84-108 (chronology of events of 1967 Detroit civil disorders).

The operational needs conclusions reached in the foregoing reports have been echoed in numerous other reports, including the many reports issued by the U.S. Commission on Civil Rights after studying such matters as public safety practices in general, the 1980 Miami riots, and the violence surround-

ing school desegretation in Boston.[21]

2. In addition to its compelling justifications, the numerical plan here was necessary, reasonably related to its objective, and narrowly tailored. It was entirely "necessary," as the trial court found, "to

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21. Based upon its study of the operational needs of public safety departments in general, the Commission in 1980 concluded that a "police force must reflect the racial and ethnic composition of the community it serves." U.S. Comm'n on Civil Rights, Police Practices and the Preservation of Civil Rights, 10 (1980). See also, e.g., U.S. Comm'n on Civil Rights, Confronting Racial Isolation in Miami (1981); U.S. Comm'n on Civil Rights, Desegregating the Boston Public Schools: A Crisis in Civic Responsibility (1975).

In addition to the general conclusions in the latter report, the Commission also pointed out that: "By its actions, the Boston Police Patrolmen's Association has made its opposition to school desegregation clear to the community. The effect of that public position is equally clear. No police force can function effectively in crisis situations unless it meticulously avoids a position of advocacy directly opposed to the law." Id. at 109-10. In fact, at the very time that effective and even-handed law enforcement was an absolute necessity, the Boston Police Patolmen's Association "membership attempted to avoid the appearance of favoring court ordered school desegregation by ignoring their law enforcement and public safety responsibilities." Id. at 113.

prevent" racially disproportionate layoffs which "would nullify the Court's prior remedial orders and frustrate the intent of those orders," 522 F. Supp. at 877, orders which in fact had been mutually agreed upon consent orders.

The proportionate layoff plan was also both reasonably related to its objective and narrowly tailored. The court did not restrain the layoff of all minority public safety officers, nor did the court restructure the seniority system. Instead the court only ordered that if the departments actually effected temporary layoffs, the layoffs could not be seniority-based[22/]

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22. The fact that the trial court's modification of the consent decrees temporarily suspended the effect of an otherwise valid state statute is not of constitutional significance. In order to effectuate a remedial decree, a federal court is fully empowered to invalidate a contrary state statute, Griffin v. County School Bd., 377 U.S. 218 (1964); Cooper v. Aaron, 358 U.S. 1 (1958), much less to order the "temporary suspension of an otherwise valid state statute," Costello v. Wainwright, 430 U.S. 325, 326 (1977).

but instead had to be racially neutral so as to retain the percentage (but not the number)of minority officers then on the forces.

In modifying the otherwise racially disproportionate layoffs, not only was "race . . . reasonably used in light of the [remedial] objectives," Bakke, 438 U.S. at 373-74 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.), but the racial modification was "narrowly tailored to the achievement of that goal," Fullilove, 448 U.S. at 480 (opinion of Burger, C.J., with White and Powell, JJ.).

3. The proportionate layoff plan neither "stigmatize[d] any group or . . . single[d] out those least well represented in the political process to bear the brunt of [this] benign program." Bakke, 438 U.S. at 361 (opinion of Brennan, J., with White,

Marshall and Blackmun, JJ.). There simply was no stigma attributable to any of the officers, either those laid off or those retained, since there was no question whatsoever about the officers' qualifications. Nor can this racially proportionate layoff plan be said to have singled out those least well represented in the political process. To the contrary, the very fact that white officers were temporarily laid off on a proportionate basis may have insured the majoritarian political result that brought an end to all of the temporary layoffs shortly after they had taken effect.

IV. If This Court Approaches These Cases Solely From the Perspective of Economic Loss, The Employer-Defendants, as the Principal Guilty Parties Before the Court, Must Bear Any Economic Burdens Flowing From the Failure of the Consent Decrees

Amici have demonstrated that the modified consent decrees were lawful, whether

viewed as amendments to an existing consent decree; as the embodiment of a negotiated remedial plan; or as a court imposed remedy. By requiring proportionate layoffs, the district court merely assured that the economic loss attributable to the frustration of the remedial provisions of the original consent decrees would be spread equitably across the workforce.

If, however, this Court chooses to approach these cases solely from the perspective of who should bear the economic loss attributable to the failure of the original consent decrees, it is both unnecessary and inappropirate to view the cases as presenting an unavoidable collision between the expectations of white workers and the compelling state interest of achieving racially integrated public safety departments in a racially mixed urban setting. If changed circumstances require

any party before the Court to bear an economic loss, surely that party should be the City of Boston -- the principal guilty party -- rather than innocent minority workers hired pursuant to valid remedial decrees.

It would be an inconceivable resolution of this case to permit the City of Boston -- the guilty party -- to shift the entire economic burden of the failure of the original remedial plan to the very class against whom it had systematically discriminated. The courts below prevented such an unjust result by assuring that layoffs would be proportionately distributed. Predictably, once the pain of layoffs was felt by the politically powerful majority, sufficient funds were discovered to re-hire all employees.

Thus, amici submit that Boston, as a guilty employer, may not seek to shift a disproportionate share of the economic

burden of the failure of the original remedial plan to its minority employees. Rather, as a public employer judicially determined to have been guilty of racial discrimination, Boston must share the economic burdens of dealing with its past racism, either by re-allocating its existing resources or by finding new ones. As the record in this case demonstrates, such a task is made easier when white jobs as well as black jobs are at stake.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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Respectfully submitted,

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